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The Key-Man System of State Jury Selection as a Source of Violation of the Fourteenth Amendment

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THE KEY-MAN SYSTEM OF STATE JURY SELECTION AS A SOURCE OF VIOLATION OF THE FOURTEENTH AMENDMENT

I. INTRODUCTION

Over four years ago Congress enacted legislation to eliminate from the federal judiciary the key-man system, a practice of procuring the names of potential jurors that has long been indulged in the American courts.[1] Despite the federal action, however, the key-man system of jury selection remains widespread at the state level. The key-man method, also known as the suggester system or the informer system, is a device by which those statutorily charged with securing jurors go about the initial step of recruiting names for jury service. If nothing else, the system may be a convenience to jury commissioners. A typical operation of the process is described in a recent Pennsylvania decision.

> The two elected Jury Commissioners wrote to the leaders of the various churches, social, and fraternal clubs, and committeemen of the political parties . . . asking for a list of names for jury service. The Commissioners also received additional names from friends and acquaintances. The names of the clubs and churches were obtained from the yellow pages of the telephone directory.[2]

Other cases present predictable variations on this pattern of consulting with persons reputed to know the community so that these "key persons" might in turn furnish names for inclusion in the list. Those considered worthy to be consulted may consist of judges, congressmen, state senators, clergymen of all denominations, presidents and cashiers of banks, and women in civic organizations.[3] They may be members of the Lions Club or officers of the Chamber of Commerce,[4] or conceivably any other persons felt to be acquainted with a variety of desirable citizens.

The key-man system bears no necessary relationship to the later procedures through which is drawn the number of jurors deemed necessary to fill the panels for a particular term of court.

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1. Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-74 (1972).
2. Commonwealth v. Carroll, 443 Pa. 518, 524, 278 A.2d 898, 901 (1971).
3. United States v. McClure, 4 F. Supp. 668, 670 (E.D. Pa. 1933).
4. *Report of the Committee on the Operation of the Jury System of the Judicial Conference of the United States*, 42 F.R.D. 353, 360 (1967) [hereinafter cited as *Jury System Report*].

Likewise, it is in no essential way connected with the still later process by which individuals are included in or challenged off the specific panel of a particular case. At each of these junctures opportunities for selection occur, the key-man system being employed at only the earliest stage. Accordingly, the word "selection" is used in this Comment to refer to the initial stages of enlistment rather than to later actions concerning the membership of an array or panel. Both grand jury and petit jury selection can be conducted by the key-man method.[5] Similarly, the practice is usable with both criminal and civil procedure, even though most of the challenges to the system have been in the criminal area.

The major focus of this Comment will be on the courts of Pennsylvania, since the practices followed in that jurisdiction appear to be representative of those in many other states as well. Reference will be made to other jurisdictions both for further amplification and in connection with federal decisions dealing with state jury selection processes. Accordance of the key-man system with constitutional principles will also be noted, and attention will be given to the distinction between the constitutionality of the key-man statutes in and of themselves and the constitutionality of the results which are achieved when the statutes are applied.

II. Statutory and Judicial Bases of the Key-Man System in State Practice

Inexplicably, the subject of jury selection has often escaped the notice of the legal profession. "Even judges are often not fully aware of the selection methods employed because they delegate broad powers to the court clerk or jury commissioner; and in practice these officials operate independently of the judges. . . ."[6] Such dissociation from close judicial supervision may help to reduce the burdens of the courts. On the other hand, however, there is the almost unavoidable inference that this division of labor serves to diminish the prospect of a fair jury, fairly chosen.[7]

Statutory regulations concerning jury selection practices fail to indicate the extensiveness of the use of the key-man system. For example, the method is nowhere mentioned in the pertinent Pennsylvania legislation,[8] in which the outline of procedures to be followed in the various classes of counties is preceded by the following base statute dealing with jury selection:

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5. *See, e.g.*, Pa. Stat. Ann. tit. 17, § 942 (1962). In this section's discussion of the duties of jury commissioners, there is the general directive to provide the names of persons to serve as jurors in the several courts of the county during the year. No distinctions are made between grand and petit juries or criminal and civil cases.

6. *Jury System Report, supra* note 4, at 359.

7. *Id.*

8. Pa. Stat. Ann. tit. 17 §§ 941-88 (1962).

> It shall be the duty of said jury commissioners, president judge, or additional law judge of the respective district, or a majority of them, to meet . . . at least thirty days before the first term of the court of common pleas, in every year, and . . . proceed, with due diligence to select, alternately, from the whole qualified electors of the respective county, at large, a number, such as at the term of court . . . next proceeding shall . . . be designated, of sober, intelligent, and judicious persons, to serve as jurors in the several courts of such county during the coming year.[9]

The jury commissions of the various judicial districts have been accorded wide freedom of operation within the framework of the statute, since its provisions have been construed as directory rather than mandatory.

The degree of stringent adherence that any court requires in the carrying out of the selection statute will, of course, be related to that court's view of how integral jury selection is to the judicial process. If a court views the selection of jurors as a preliminary administrative detail, latitude will be accorded those charged with its execution.[10] If, however, the selection of jurors is viewed as

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9. *Id.* § 942. The definition of "directory" and "mandatory" most frequently cited by the Pennsylvania courts is that articulated in Deibert v. Rhodes, 291 Pa. 550, 140 A. 515 (1928):

> A mandatory provision is one, the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to validate the proceeding.

Id. at 554-55, 140 A. at 517. The distinction between mandatory and directory construction is, of course, found throughout statutory interpretation and is thus by no means unique to the field of jury selection. On occasion other terms than "mandatory" and "directory" are used to distinguish between the discretionary powers and the operative duties which may have been intended when a particular piece of legislation was enacted. For example, the Supreme Court of Pennsylvania has also spoken of the two interpretive approaches as permissive and mandatory. Commonwealth v. S.M. Byers Co., 346 Pa. 555, 561, 31 A.2d 530, 532 (1943). At least one state, Maryland, has held in connection with a jury selection statute that substantial compliance is sufficient even though the statute is mandatory. Downs v. State, 78 Md. 128, 131, 26 A. 1005 (1893). *See* King v. State, 190 Md. 361, 58 A.2d 663, 665 (1948). Recently there appeared before the United States Supreme Court a case, Carter v. Jury Comm'r of Greene County, 396 U.S. 322, 323 n.2 (1970), involving the Alabama jury procurement statute, ALA. CODE tit. 30 §§ 20, 24 (Supp. 1967), which requires the jury commissioners to place on the jury roll the name of every qualified, non-exempt person. The Court took judicial notice that Alabama courts had regarded this requirement as permissive rather than mandatory and did not challenge the validity of this state interpretation. Carter v. Jury Comm'r of Greene County, 396 U.S. at 323 n.2.

10. *See* Commonwealth v. Eckhart, 430 Pa. 311, 314, 242 A.2d 271, 273 (1968); Commonwealth v. Fugmann, 330 Pa. 4, 28, 198 A. 99, 111 (1938), citing PA. CONST. art. I, § 6.

among the inviolate rights of trial by jury, the manner of selection then becomes subject to more exacting scrutiny.[11] Pennsylvania has taken the position that the state constitutional guarantee of the inviolateness of the right to trial by jury does not reach so far as to include within its concern the details of jury selection.[12]

Not only do the Pennsylvania courts provide the jury commissioners with broad discretion in permitting them to depend upon suggesters who are not provided for statutorily; the options of the commissioners are also increased by the manner in which the requirement to select jurors from the "whole qualified electors"[13] has been interpreted. Differing interpretations are provided in the statutory material for each of the first four classes of Pennsylvania counties,[14] with no specific directives being established for counties of the five remaining classes.[15] These disparities have been noted by the Supreme Court of Pennsylvania,[16] which found them not violative of the equal protection clause of the fourteenth amendment.[17]

No rationale for the diversity of provisions is set forth in either the statutes themselves nor in the court's comments concerning the matter.[18] However, the United States Supreme Court has noted that in the absence of a constitutional provision on the subject and as long as the essential requisites of trial by jury are preserved, the qualifications of jurors are matters of legislative control.[19]

The leeway of the commissioners is most apparent in the provisions for counties of the third class.[20] There the mandate to select from the "whole qualified electors" is accomplished by considering the eligibility of "adult citizens of the United States, residents of the county and able to understand the English language."[21] In counties of the first class, the most nearly literal construction prevails, with the phrase being interpreted as calling for a selection from "a duly certified list of all the registered voters" prepared by the registration commission.[22] In counties of the second class and second class A, the requirement is fulfilled by consulting an alpha-

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11. Peters v. Kiff, 407 U.S. 493, 500 (1972).
12. Commonwealth v. Fugmann, 330 Pa. 4, 28, 198 A. 99, 111 (1938), citing PA. CONST. art. I, § 6.
13. PA. STAT. ANN. tit. 17, § 942 (1962).
14. PA. STAT. ANN. tit. 17, §§ 1252(a), 1276, 1322 (1962). The counties of Pennsylvania are divided into nine classes according to population. PA. STAT. ANN. tit. 16 § 210 (1972).
15. PA. STAT. ANN. tit. 17 § 942, construed in Commonwealth v. Aljoe, 420 Pa. 198, 205, 216 A.2d 50, 54 (1966).
16. Commonwealth v. Aljoe, 420 Pa. 198, 205, 216 A.2d 50, 54 (1966).
17. *Id.* at 207, 216 A.2d at 55 (1966).
18. *Id.*
19. Brown v. Allen, 344 U.S. 443, 473 (1952).
20. PA. STAT. ANN. tit. 17, § 1322 (1962).
21. *Id.*
22. PA. STAT. ANN. tit. 17, § 1252(a) (1962).

betized list of all persons assessed for the purposes of taxation.[23] The provision for third class counties would seem to be particularly vulnerable to challenge. In addition to its failure to specify an objective list from which the jury commissioners are to draw the names, there is no charge to the commissioners to include among those eligible for jury service the names of *all* persons falling within its description. The statute simply provides that *only* persons meeting the qualifications shall be considered, with no affirmative duty being imposed upon the officials to guard against exclusionary practices.

Also questionable is the provision that jury commissioners in first class counties select jurors from the list of registered voters. The policy of this provision would appear to be that those who have not registered to vote or who have allowed their registration to lapse intended to screen themselves out as possible candidates for jury duty.[24] In accepting such an assumption, courts and legislatures have not dealt with the possibility that mere disillusionment with the elective process may bear no relation to a citizen's desire to see justice accorded his peers. If this prospect is taken into account, it would seem that the phrase "whole qualified electors" is given the interpretation most conducive to justice in second class counties, where the phrase is equated with the tax list. Such lists provide the most nearly complete compilation available to the various governmental bodies, and continual updating is assured through annual assessments. In this regard, the Supreme Court of the United States has stated that the use of tax rolls is the most comprehensive method short of an annual census.[25]

When the discretion of the jury commissioners to choose from some but not necessarily all English speaking adult resident citizens is combined with the option to rely on a small number of suggesters to provide the names of such citizens, the opportunities for affecting the outcome of trials begin to become apparent. Labeling the procurement procedures as "administrative" disregards this very definite effect which such procedures can exert on the deter-

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23. PA. STAT. ANN. tit. 17, § 1276 (1962). The desirability of such diverse interpretations of "whole qualified electors" is questionable. Recent action of the Pennsylvania Legislature indicates the confusion and slips to which the multiple definitions can lead. Act No. 123, signed into law June 16, 1972, amending the Jury Law, Second Class Counties of May 11, 1925 (Pub. L. No. 561), reduced the minimum age requirement for jurors in counties of the second class to 18. No similar provisions were made for the other classes of counties.

24. *Jury System Report,* supra note 5, at 360.

25. Brown v. Allen, 344 U.S. 443, 474 (1952).

mination of a case. Even when states grant jury trials where not required to do so by the federal constitution, they must see that all relevant constitutional guarantees are assured at every stage of the judicial process.[26] The history of litigation concerning validly constituted juries attests to the substantial role which the reputed "administrative" detail of selection can play in a jury trial.

III. Application of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to Jury Selection Procedures

A. *The Equal Protection Clause*

The Supreme Court has noted its use of two basic tests in determining whether a challenged state practice violates the equal protection clause of the fourteenth amendment.[27] First, there is the broad test of whether the particular classification in question rests on some "reasonable basis."[28] Under this test, if any factual circumstances can be conceived which would sustain the classification, the Court will assume the existence of those factual circumstances at the time when the classification took place, and the classificatory scheme will be allowed to stand.[29] The burden of showing that the disputed grouping is arbitrary rests upon the party challenging it,[30] and normally the validity of the classification is sustained.[31] This test of the equal protection clause has been applied primarily to cases of application of state police power to commerce and industry.[32]

The second test under the equal protection clause is that of a "compelling interest."[33] This test has been invoked where the state classification in question is based on a "suspect" classification such as nationality,[34] race,[35] or alienage.[36] Such classificatory schemes must be viewed in the light of the historical fact that the chief intent of the fourteenth amendment was to eliminate all racial discrimination emanating from official sources within the states.[37]

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26. Hill v. Texas, 316 U.S. 400, 406 (1942). Duncan v. Louisiana, 391 U.S. 145 (1968) made mandatory on states the provision of trial by jury for all defendants charged with serious criminal offenses.
27. Graham v. Richardson, 403 U.S. 367, 371-72 (1971).
28. *Id.* at 371; Central R.R. v. Pennsylvania, 370 U.S. 607, 617 (1962).
29. Morey v. Doud, 354 U.S. 457, 464 (1957).
30. *Id.*
31. McLaughlin v. Florida, 379 U.S. 184, 191 (1964).
32. Comment, *The Pennsylvania Work Rule,* 76 Dick. L. Rev. 160, 174 (1971); *see, e.g.,* Central R.R. v. Pennsylvania, 370 U.S. 607 (1962); Morey v. Doud, 354 U.S. 457 (1957).
33. Oregon v. Mitchel, 400 U.S. 112, 238 (1970) (opinion concurring in part, dissenting in part); *see* Sherbert v. Verner, 374 U.S. 398, 406 (1963).
34. Oyama v. California, 332 U.S. 633, 644-46 (1948); Korematsu v. U.S., 323 U.S. 214, 216 (1944); Hirabayashi v. U.S., 320 U.S. 81, 100 (1943).
35. McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964).
36. Graham v. Richardson, 403 U.S. 367, 372 (1971).
37. McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

Consequently, classifications based upon race or national origin are inherently suspect[38] and subject to the closest judicial scrutiny.[39] As indicated below,[40] it is this second test of the equal protection clause which has been applied to state jury selection practices.

Within only a few years after the enactment of the fourteenth amendment, the Supreme Court granted Negro defendants standing to challenge their convictions by juries from which members of their race had been discriminatorily excluded. The earliest decisions formed a landmark trilogy. In *Strauder v. West Virginia*[41] the petition of a black defendant led to the striking down of a statute which on its face provided for the exclusion from juries of members of his race.[42] In *Virginia v. Rives*[43] a black defendant indicted for murder sought removal of his trial to the federal courts on the ground that there were in fact no blacks in the venire from which his jury was drawn.[44] His petition followed denial in the state court of his motion that one third or some other acceptable portion of the jury be composed of members of his own race. It was held that the denial of that motion was not tantamount to the deprivation of any right guaranteed by the fourteenth amendment and that a mixed jury in a particular case was not essential to the equal protection of the laws.[45] The Court added that

> it is a right to which every colored man is entitled, that in the selection of jurors to pass upon his life, liberty, or property, there shall be no exclusion of his race . . . . But this is a different thing from . . . a right to have a jury composed in part of colored men.[46]

In the third case, *Ex parte Virginia*,[47] the Court ruled on the challenge by a state judge of the statute under which he was convicted for the federal crime of excluding Negroes from state grand and petit juries.[48] The Court sustained the statute in question as a valid means of enforcing the equal protection clause.[49] The following term, the Court held in *Neal v. Delaware*[50] that the guaran-

38. Graham v. Richardson, 403 U.S. 367, 372 (1971).
39. *Id.*
40. *See* note 52 and accompanying text *infra.*
41. 100 U.S. 303 (1879).
42. *Id.* at 308-09.
43. 100 U.S. 313 (1879).
44. *Id.*
45. *Id.* at 322.
46. *Id.* at 322-23.
47. 100 U.S. 339 (1879).
48. *Id.*
49. *Id.* at 349.
50. 103 U.S. 370 (1880).

tee of equal protection was violated where a statute not unfair on its face was unfairly administered.[51]

These early cases presaged the formulation of the compelling interest test, with its subjection of all racial classifications to extreme scrutiny.[52] Later cases have extended the constitutional protection against discriminatory jury exclusion to all identifiable groups in the community which may be the subject of prejudice.[53] As stated in *Hernandez v. Texas*,[54] equal protection is not directed solely against discrimination arising from a "two-class theory" based upon differences between whites and blacks.[55]

Standing to sue under the equal protection clause is readily discernible in the case of defendants indicted or convicted by juries that were selected by means discriminatory to the defendant's class. The Supreme Court has recently held, however, in *Carter v. Jury Commissioner of Greene County*[56] that persons excluded from jury duty because of their class are as much aggrieved of their equal protection rights as are those indicted and tried by panels discriminatorily chosen.[57] In *Carter* the Court granted certiorari to a suit arising from a class action attacking the jury systems of a county in Alabama. The appellants urged that, although they were qualified for jury service and desired to be called, no summons had ever been issued to them because of the arbitrary action of the officials in charge of juror procurement. The case is distinctive as being the first litigation to reach the Court in which an attack upon alleged racial discrimination in choosing juries was made by plaintiffs desiring affirmative relief, rather than by defendants seeking the reversal of lower court decisions on the ground of systematic exclusion of a class from grand or petit juries.[58]

The appellants pointed to the fact that whereas three quarters of the population of the county was black, the largest number of Negroes to appear on the jury list from 1961 to 1963 was about seven percent of the total.[59] In 1967 the jury commissioners ex-

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51. *Id.* at 397.
52. *See* notes 33-40 and accompanying text *supra*.
53. Swain v. Alabama, 380 U.S. 202, 205 (1965).
54. 347 U.S. 475 (1954).
55. *Id.* at 478.
56. 396 U.S. 320 (1970).
57. *Id.* at 329.
58. *Id.*
59. Although statistical data may be indicative of discriminatory practice, the Court has not announced mathematical standards for demonstrating the systematic exclusion of various identifiable groups. It has rather emphasized that in every case there is necessary a factual inquiry into all possible explanatory factors. Thus there appears to have been no instance in which a prima facie case of racial discrimination has been based solely on statistical improbabilities. In every reversal where mathematical analysis showed a highly improbable result there has also been found to exist selection procedures that in themselves were not neutral. Alexander v. Louisiana, 405 U.S. 625, 630 (1972).

panded the list in response to certain legislation, but the juries in question still contained only half as many black members as a random selection from the entire population would have produced.[60] The complainants challenged the constitutionality of the pertinent state statutes both on their face and as applied.[61] They urged that the requirement that jury commissioners select for service only those persons who are "generally reputed to be honest and intelligent and . . . esteemed in the community for their integrity, good character, and sound judgment" provided a discriminatory opportunity of which the commissioners had in fact taken advantage.[62]

The Court refused to strike down the challenged statute.[63] It noted that nearly every state exacts of its jurors certain requirements of citizenship, age, and language. The provisions pertaining to good character were similarly found to be comparable to acceptable requirements of other jurisdictions that jurors be discreet, intelligent, of good demeanor, and the like.[64] The fact that such statutes can be nondiscriminatorily enforced provided the basis for the Court's upholding their validity.[65] Although the desired relief was not granted, it must be noted that the Court did not close the door to such challenge. No longer may it be said that defendants in criminal proceedings possess the only cognizable legal interest in non-discriminatory jury selection.[66] It is clear that there is no procedural or jurisdictional bar to the attack on jury discrimination by citizens unfairly excluded from the jury roll.[67]

The opportunity for violation of the equal protection clause through the use of key persons is most obvious where no suggesters are included from certain identifiable groups within the jurisdiction. Adamant defenders of the system would answer this challenge by arguing that even in such a case the key persons who are actually consulted could provide lists reflective of the general composition of the community.[68] A more candid appraisal of the practice, however, leads to the unavoidable conclusion that suggesters from a certain segment of the community will be more

60. Carter v. Jury Comm'r of Greene County, 396 U.S. 320, 327-28 (1970).
61. *Id.* at 331, citing ALA. CODE tit. 30, § 21 (Supp. 1967).
62. *Id.*
63. *Id.* at 336.
64. *Id.* at 333.
65. *Id.* at 336.
66. *Id.* at 330.
67. *Id.* at 331.
68. *See* Smith v. Yeager, 465 F.2d 272 (3d Cir. 1972).

likely to provide names of members of that segment than names of persons from other identifiable groups.[69]

In addition to its readily apparent pitfalls, the system can also be the occasion for more subtle failures. Even where deliberate attempts are made to include minority citizens on jury lists through the use of minority suggesters, the key persons may simply fail to respond to the jury commissioners' requests,[70] and state courts may be indifferent to the implications of such failure.[71] Again, state courts may validate the use of the key-man system with minority groups who are not accessible to more effective methods of procurement, as where perfunctory door-to-door surveys are made in urban areas by canvassers among whom there are no members of the groups discriminated against.[72]

At times deliberate efforts to include the suggestions of minority leaders fail because no records are kept as to whether these suggesters respond to the commissioners' inquiries.[73] If in such situations the jury commissioners are not aware that certain groups are underrepresented on the jury lists, there would seem to be no likelihood of the commissioners' issuing follow-up requests to key persons in attempts to correct the deficiency. This situation is illustrated by *Commonwealth v. Carroll.*[74] The Negro defendant in *Carroll* appealed his conviction in a court of common pleas on the grounds of denial of equal protection. In essence, the appellant attacked the jury selection system of the county as discriminatory against minority groups and persons in the lower economic categories in general. The jury commissioners testified that they had actual knowledge that request letters had been sent to predominantly Negro clubs and churches, but they were not able to say that their inquiries had produced any responses. Neither could they say with certainty that personal contacts with Negroes who were political committeemen had yielded any names.[75] Despite this deficiency, the court approved the actions of the commissioners.[76] Their approval was based on the fact that the commissioners had familiarized themselves with all the significant elements of the community and had made efforts to consult leaders from the various population groups, even though the hoped for results of the consultations were not forthcoming.[77]

Commonwealth v. Carroll would not seem to be in line with

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69. *Id.* at 281.
70. Salary v. Wilson, 415 F.2d 467, 471 (5th Cir. 1969).
71. *Id.*
72. *Id.*
73. Commonwealth v. Carroll, 443 Pa. 518, 524, 278 A.2d 898, 901 (1971).
74. 443 Pa. 518, 278 A.2d 898 (1971).
75. *Id.* at 524, 278 A.2d at 901.
76. *Id.* at 526, 278 A.2d at 902.
77. *Id.*

federal holdings in similar instances. The Supreme Court has noted that there is imposed on jury commissioners the affirmative duty to supplement the jury lists by going out into the community and personally acquainting themselves with the citizenry whenever the lists in existence are not fully reflective of those qualified for service.[78] Similarly, the courts have noted that the officials responsible for administering the jury selection machinery may not transfer to any other segment of the community the responsibilities which the law imposes upon them.[79] Jury commissioners are also prohibited from using the unresponsiveness of minority key men as an excuse for validating an insufficient selection method.[80]

Both those decisions which have approved of the key-man system[81] and those which have found the deficiencies of the system to be sufficient grounds for reversing convictions[82] have recognized that there must exist the fair possibility of the jury's reflecting a representative cross section of the community. In *Carroll* this necessity is explicitly considered but paradoxically resolved. The Pennsylvania Supreme Court notes that the United States Supreme Court has produced a long line of cases dealing with exclusion from jury service as a violation of equal protection.[83] They also note that the concept of a jury composed of a cross section of the community is clearly embodied in the constitution of Pennsylvania.[84] Nevertheless, the Pennsylvania Supreme Court concluded that the jury selection procedures of the county in question were not violative of constitutional requirements.[85]

The representative cross section test has become increasingly pervasive over the years. The principle of a representative jury was early articulated by the Supreme Court on the basis of the fourteenth amendment guarantee of equal protection and was employed to vindicate the right of a black defendant to challenge the systematic exclusion of members of his race from grand or petit juries.[86] Later the Court, on the basis of its supervisory power over the federal judiciary, extended the principle so that any defendant could challenge the arbitrary exclusion of his own or any

78. Turner v. Fouche, 396 U.S. 346, 355 (1970).
79. Salary v. Wilson, 415 F.2d 467, 472 (5th Cir. 1969).
80. *Id.*
81. *E.g.*, Commonwealth v. Carroll, 443 Pa. 518, 278 A.2d 898 (1971).
82. Smith v. Yeager, 465 F.2d 272 (3d Cir. 1972).
83. Commonwealth v. Carroll, 443 Pa. 518, 278 A.2d 898, 899 (1971).
84. *Id.*, 278 A.2d at 900, citing PA. CONST. art. 1, § 9.
85. *Id.* at 523, 278 A.2d at 900.
86. *E.g.*, Strauder v. West Virginia, 100 U.S. 303 (1879). *See* notes 41-42 and accompanying text *supra.*

other class from jury service.[87] More recently, a sixth amendment basis has been invoked so that the principle of the representative jury appears to have emerged as an aspect of the constitutional right to trial by jury.[88]

The failure of the key man system to produce a cross sectional representation in juries is of sufficient importance that it cannot be excused by even the innocence of the jury commission involved. Regardless of the intention of the administrators, the results produced determine the validity of the process employed.[89] No commission should be exonerated by affirming that they acted in good faith.[90] Thus *Carroll*[91] and other cases exculpating jury commissioners who had familiarized themselves with all of the significant elements in the community and made special efforts to consult leaders from these various population groups cannot be viewed as normative. Whenever steady and significant disparities are found in the composition of jury venires, there rightfully rests on the responsible officials the burden of proving that the guarantees of equal protection have not been violated.

B. *The Due Process Clause*

The due process clause has been interpreted as directed toward two basic objectives.[92] The first objective is that of insuring the reliability of the guilt determining process.[93] Thus a defendant cannot, consistent with this first goal of the due process guarantee,

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87. *E.g.*, Glasser v. United States, 315 U.S. 60 (1940):
> For the mechanics of trial by jury we revert to the common law as it existed in England when the constitution was adopted. [citation omitted] But even as jury trial, which was a privilege at common law, has become a right with us, so also, whatever limitations were inherent in the historical common law concept of the jury as a body of one's peers do not prevail in this country. . . . Jurors in a federal court are to have the qualifications of those in the highest court in the State, and they are to be selected by the clerk of the court and the jury commissioner . . . . [E]xercise [of this duty] must always accord with the fact that the proper functioning of the jury system, and indeed, our democracy itself, requires that the jury be a 'body truly representative of the community. . . .'

Id. at 85-86.

88. Williams v. Florida, 399 U.S. 78 (1970):
> The Court must look to the specific language of the provision and the intent of the Framers when the Bill of Rights was adopted. This approach is necessary, not because the Framers intended the Bill of Rights to apply to the States when it was proposed in 1787, but because the application of those provisions to the States by the Fourteenth Amendment requires that the original intent be the governing consideration in state as well as federal cases.

Id. at 108.

89. Hernandez v. Texas, 347 U.S. 475, 482 (1954).

90. Alexander v. Louisiana, 405 U.S. 625 (1972).

91. 443 Pa. 518, 278 A.2d 898 (1971).

92. Packer, *Two Models of Criminal Procedure*, 113 PA. L. REV. 1 (1964).

93. Gideon v. Wainwright, 372 U.S. 335, 342 (1963).

be subjected to trial by jurors who have been intimidated by threat of mob violence,[94] by a juror who is insane,[95] or by jurors who have formed fixed opinions of the case as a result of news media publicity.[96]

In contrast with the first goal of the due process clause, the second is not concerned with outcome-determinative matters. To a great extent it escapes precise definition and must be spoken of in terms of more elusive objectives such as the assurance of "ordered liberty."[97] This goal is attained through preserving the government,[98] through assuring basic human dignity,[99] and through maintaining respect for our laws and for our Constitution.[100] These objectives are illustrated by *Rogers v. Richmond.*[101] *Rogers* dealt with the admission into evidence of involuntarily obtained confessions. The Supreme Court emphasized that such evidence must be excluded not on the basis of being unreliable, but rather on the grounds that the methods used to extract it offended underlying principles of our common law.[102]

The thwarting of both goals of the due process clause through the use of discriminatory jury selection techniques is illustrated by *Peters v. Kiff.*[103] Although *Kiff* does not deal specifically with a challenge to the key-man system, it deals in a generic way with the systematic exclusion of potential jurors and thus provides guidelines for use in connection with the more narrow key-man question. In this case a white defendant contended that he was deprived of his rights of equal protection and due process by the exclusion of blacks from the state grand jury that indicted him and from the petit jury that convicted him.[104] The state courts had held that because the defendant was not black he had not suffered any constitutional deprivation and that, therefore, his conviction would be required to stand.[105]

The Supreme Court considered the challenge solely in light of the due process guarantee.[106] In addressing itself to the first or

94. Moore v. Dempsey, 261 U.S. 86 (1923).
95. Jordan v. Massachusetts, 225 U.S. 167, 176 (1912).
96. Irvin v. Dowd, 366 U.S. 717 (1961).
97. Palko v. Connecticut, 302 U.S. 319, 325 (1937).
98. Mapp v. Ohio, 367 U.S. 643, 659 (1961).
99. *See* Rogers v. Richmond, 365 U.S. 534, 541 (1961).
100. Mapp v. Ohio, 367 U.S. 643, 659 (1961).
101. 365 U.S. 534 (1961).
102. *Id.* at 541.
103. 407 U.S. 493 (1972).
104. *Id.* at 494.
105. *Id.*
106. *Id.* at 505.

outcome-determinative consideration of due process, the Court emphasized that even when the group excluded is racial in nature, the ramifications of the exclusion extend far beyond racial questions.

> [W]e are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human experience, the range of which is unknown and unknowable.[107]

Regarding the ordered liberty objective of the due process clause, the Court stated that discriminatory jury selection procedures impugn the integrity of the whole judicial process.[108] Accordingly, such practices are unconstitutional not only because they increase the risk of bias, but also because they create the appearance of bias.[109]

One aspect of the importance of *Kiff* to the key-man issue is seen in its providing wide accessibility to challenge of juror procurement procedures. The Court stated that because of the very great possibility of harm latent in any unconstitutional jury selection system, any doubt should be resolved by according the opportunity to challenge the jury to too many defendants rather than to too few.[110] Prior to this ruling, a number of state courts and lower federal courts had imposed the same-class rule on challenges to discriminatory jury selection and had held that the exclusion of a class from jury service is subject to challenge only by a member of the excluded group.[111] Before *Kiff* the Supreme Court had avoided passing on the same-class ruling. With the *Kiff* decision, however, standing to sue may no longer be made dependent upon the class of the challenger.

IV. Analogy to the Federal System

In the Jury Selection and Service Act of 1968[112] the federal government sought to remove the deficiencies of the key-man system from its juror procurement methods. Federal actions of this type exert at most a persuasive influence on the states. The states possess the right to establish their own valid selection procedures and also to create their own relevant qualifications for jurors.[113]. Nevertheless, it is suggested that states take note of recent federal

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107. *Id.* at 503.
108. *Id.* at 502.
109. *Id.*
110. *Id.* at 504.
111. *Id.* at 496 n.4.
112. 28 U.S.C. §§ 1861-74 (1972).
113. Nearly every state requires that its jurors be citizens of the United States, residents of the judicial district, of a stated minimum age, and able to understand English. Many states also require that jurors be of "good character." *See, e.g.*, Carter v. Jury Comm'r of Greene County, 396 U.S. 320, 333 (1970).

legislation as an aid in ascertaining that they themselves are providing adequate constitutional guarantees.[114] The states must also remain cognizant of federal statutory effectuations of the fourteenth amendment as applied to the exclusion of jurors in criminal trials on account of race or color (which remains the major area in which key-man abuse occurs) and as applied to deprivation of rights under color of law.[115] These civil rights statutes make no distinction between federal and state violations. Jury commissioners are specifically cited as liable to fine for excluding or failing to summon any citizen for jury duty in violation of fourteenth amendment provisions, and state level officials are accorded no differentiation of duty or degree of punishment from that prescribed for commissioners working within the federal framework.[116]

Preceding and influencing the Jury Selection and Service Act was the Report of the Committee on the Operation of the Jury System of the Judicial Conference of the United States.[117] The report did not limit its survey and recommendations to the needs of the federal judicial system, but also included a call for extensive revisions at the state level.[118] The United States government acted relatively quickly to correct certain defects which the report cited.[119] Similar problems have often continued in the state courts, unabated by legislative action.[120]

If the Jury Selection and Service Act of 1968 had been concerned only with procuring procedural uniformity in the federal

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114. *E.g.*, State v. Rochester, 54 N.J. 85, 91, 253 A.2d 474, 477 (1969).

115. 18 U.S.C. §§ 242-43 (1969).

116. "[w]hoever being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen [because of race] shall be fined not more than $5000." 18 U.S.C. § 243 (1969).

117. 42 F.R.D. 353 (1967).

118. *Id.* at 367-68.

119. Congress responded by passing the Jury Selection and Service Act of 1968. 28 U.S.C. §§ 1861-74 (1972), *replacing* 28 U.S.C. §§ 1861-74 (1967).

120. One state that has heeded the necessity to reform its jury selection statutes is Maryland. In 1969 major sections of its code provisions in this area were repealed. The new provisions closely parallel the rationale and emphasis and even the wording of the federal Jury Selection and Service Act of 1968. MD. ANN. CODE art. 51, §§ 1-22 (1972). One possible occasion for discrimination is found in the provision for selection of jurors not only from the voter registration lists but also from "such additional sources as may be prescribed." MD. ANN. CODE art. 51, § 3. The circuit court of any county is also accorded the privilege of modifying its plan at any time provided it promptly notifies the Court of Appeals of the modification and files copies of the changes with the court. MD. ANN. CODE art. 51, § 14d. As of this date, there is no reported litigation challenging the modification provisions.

system, the states would not be remiss in failing to look to it for direction. The basis of the Act is not, however, simply procedural. It was put into law to insure substantive rights of a type which must be guaranteed in all courts.

> The purpose of the act is to provide improved judicial machinery for the selection without discrimination . . . of grand and petit juries. Its aim is to assure litigants that potential jurors will be selected at random from a representative cross section of the community and that all qualified citizens will have the opportunity to be considered for jury service.[121]

The legislative history of the Act similarly attests to the substantive motives behind its adoption. "The technique of random selection tends to insure, according to the laws of probability, that distortion most often will be minor and will even out in the long run."[122]

A comparison of the 1968 Act with its predecessor[123] reveals basic shifts of emphasis and rationale. The earlier jury selection statute accorded priority to exclusionary provisions. At the outset it established certain hurdles of ineligibility of which potential jurors were required to be free in order to escape disqualification.[124] The current statute, to be sure, contains qualifications for jury service. Nevertheless, priority emphasis is now given to a policy declaration calling for random selection from a fair cross section of the community.[125] This declaration of policy is followed and reinforced by a new section dealing specifically with the prohibition of discrimination.[126]

The emphasis and rationale of the pertinent Pennsylvania statutes seem to be more similar to the now discarded federal guidelines than to the policies of the 1968 federal revision.[127] Significantly, there is no policy declaration to the effect that juries be representative of the community or that all citizens have the opportunity and obligation to serve as jurors. Qualification hurdles are accorded prominent status.[128] Opportunities for exemption, with their adverse consequences to cross representation, vary with the classes of counties. In counties of the first and third class, it would appear that any person summoned could be excused by showing cause to the satisfaction of the court.[129] In the provisions for second class counties, certain groups are singled out for ex-

121. United States v. Torquato, 308 F. Supp. 288, 290 (W.D. Pa. 1969).
122. U.S. Code Cong. and Adm. News, 1968, Vol. 2, p.1798.
123. 28 U.S.C. §§ 1861-74 (1967).
124. Act June 25, 1948, ch. 646, § 1861, 62 Stat. 951 (1948), *as amended* 28 U.S.C. § 1861 (1972).
125. 28 U.S.C. § 1861 (1972).
126. 28 U.S.C. § 1862 (1972).
127. PA. STAT. ANN. tit. 17, §§ 941-1342 (1962).
128. *Id.* at § 1322.
129. *Id.* at §§ 1257, 1327.

emption from service, but the list of those accorded the privilege of being excused is in itself lengthy and contrasts markedly with the few categories exempted under the federal statutes.[130]

V. Federal Involvement to Insure Proper State Jury Selection

Although the constitutional guarantee of trial by jury is far less extensive in state than in federal actions, once a state chooses to provide grand and petit juries, whether or not required to do so, it must hew to federal constitutional criteria, including proper jury selection procedures.[131] Furthermore, the federal and state courts share the duty of insuring the defendant of his right to equal protection and due process throughout the procedure of his being brought to justice in a state tribunal.[132]

Certain recent decisions illustrate the prerogative of the federal judiciary to assume jurisdiction where those in charge of state jury selection have been discriminatory in their actions. In *Turner v. Fouche*[133] the Supreme Court dealt with a challenge to the constitutionality of the system followed in many Georgia counties whereby the selection of the board of education was left to the members of the grand jury. The complaint alleged that blacks were perennially underrepresented on the grand jury panel, which was selected by white jury commissioners. The Court held that a prima facie case of discrimination existed where there was a significant disparity between the percentages of black residents as a whole and blacks on the jury lists if the disparity originated partially or wholly at the juncture in the selection process where the jury commissioners employed their subjective judgment.[134]

It must be noted that the Court did not hold the statute unconstitutional simply because it permitted the jury commissioners

130. *Id.* at § 1279. Among those to be exempted automatically in counties of the second class are attorneys at law, physicians, professional nurses in active practice, school teachers, employees of municipal police and fire departments and all county, state, and federal employees. Those excluded on request include druggists, undertakers, ministers, members of religious orders, persons who served nine years or more in the Pennsylvania National Guard, those honorably discharged after serving nine months or more in the active service of the United States, and others who cannot serve without hardship, loss, or serious inconvenience. New Jersey statutes are similar, adding exemptions for such categories as telegraph and telephone personnel and fish and game protectors. N.J. Rev. Stat. § 2A:69-2 (1972).

131. Hill v. Texas, 316 U.S. 400, 406 (1942).

132. *Id.*

133. 396 U.S. 346 (1970).

134. *Id.* at 360.

to invoke their subjective judgment. The Georgia officials had relied on the constitutionality of the statute on its face in an attempt to defeat the Supreme Court's intervention in the matter. It was the state's assertion that a distinction must be made between attacks on statutes and attacks upon the result of their administration on the local level, and they urged that their case fell within the latter category so that the Supreme Court would lack jurisdiction to entertain an appeal.[135] Although the Court confirmed the state officials assertion of the constitutionality of the statute, it nevertheless asserted its jurisdiction over the matter by pointing to the distinction between the unconstitutionality of a *statute* either on its face or as applied and the unconstitutionality of the *result* obtained by the use of a statute not itself attacked as invalid.[136] Since the result of the application of the statute denied to some the privilege of being considered for public service on the basis of distinctions which violated federal guarantees, the Court sustained the petitioner's allegation of discriminatory exclusion from jury service.[137]

The applicability of *Turner* to the key-man question is severalfold. The use of key men inevitably results in the exercise of subjective judgment, not once, but twice in the juror procurement process: jury commissioners must first decide whom they will consult as key persons and key persons must then decide whom they will recommend for inclusion in the jury lists. Furthermore, the nondiscriminatory face of the key-man statute can never be a shield to challenge of the system. The Court will assume jurisdiction and look to the outcome of the implementation of the statute, regardless of how fair the statute may be on its face. In this respect, the Court's position in *Turner* is similar to that which it assumed in *Peters v. Kiff*.[138] *Kiff* also dealt with the unconstitutionality of the results of certain jury selection practices rather than with the unconstitutionality of the jury selection statutes in and of themselves.[139] As with *Turner*, the statutes with which *Kiff* was concerned were allowed to stand although the unconstitutional results of their implementation were set aside.

Turner also shows the Court's use of random jury selection as the standard by which the validity of all other jury selection systems must be judged.

> The undisputed fact was that Negroes composed only 37% of the . . . citizens on the . . . list from which the jury was drawn. That figure contrasts sharply with the representation that their percentage (60%) of the general . . . popula-

135. *Id.* at 353 n.10.
136. *Id.*
137. *Id.* at 359.
138. 407 U.S. 493 (1972).
139. *Id.* at 2169.

> tion would have led them to obtain in a random selection.[140]

Thus, although not holding subjective selection statutes invalid in and of themselves, the Court seems to have intimated that randomized procedures are to be preferred for their objectivity and their safeguards against deliberate prejudice in any specific instance.[141]

The suspect nature of the use of subjective judgment in jury selection is specifically applied to the key-man process in *Smith v. Yeager*.[142] In this appeal to the Third Circuit, a black male defendant contended that the key-man system used to select grand jury venires and the practice of choosing petit jury venires from the voting lists and city directories were unconsitutional because they excluded disproportionate numbers of Negroes, women, working class persons, and residents of the city of Newark. Because of its disposition on the key-man issue, the court did not reach the question of the constitutionality of the lists from which petit jury selections were made.

On the lower level it had been held that a showing of steady underrepresentation of various groups on the grand jury was in itself insufficient to make out a prima facie case of discrimination.[143] The additional element required by the trial court was a deliberate practice of total exclusion, a deliberate practice of token inclusion, or a deliberate interference with an otherwise valid procedure.[144] *Yeager* rejected the requirement of showing deliberate discrimination above and beyond a showing of consistent underrepresentation and held that the underrepresentation of blacks on the grand jury was the likely result of the jury commissioners' seeking out sug-

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140. Turner v. Fouche, 396 U.S. 346, 359 (1970).

141. The Court has not issued a definition of random selection. The Jury Selection and Service Act of 1968 is similarly lacking in any description of the mechanics of a randomized procedure. Instead, the Act lays down some general guidelines for random jury selection and states that each judicial district may devise its own method of meeting the requirement. 28 U.S.C. § 1862 (1972). Basic to the random technique, however, is the indiscriminate selection of names from a broadly comprehensive list, such as the tax rolls or the voter registrations. An apparently acceptable approach is illustrated by the following hypothetical. The responsible officials of a certain judicial district determine that 1 out of every 100 persons on the list will be required to fill the panels for the terms of court in question. A number from 1 through 100 is selected by draw. If, for example, the number 9 is chosen, a summons to jury duty would be sent to the 9th person on the list, the 109th, the 209th, and so forth.

142. 465 F.2d 272 (3d Cir. 1972).

143. *Id.* at 274.

144. *Id.*

gesters of names for grand jury duty.[145] Although the Third Circuit repeatedly spoke in terms of "consistent" underrepresentation, the United States Supreme Court has stated that discrimination does not necessarily depend upon systematic exclusion continuing over a long period or practiced by a succession of jury commissioners.[146] Accordingly, it would appear that the holding in *Yeager* could be validly extended beyond cases where there exists long continued absence of a definite class from jury lists.

Ironically, *Yeager* arose from circumstances in which the key-man system had been relied upon to correct the lack of Negro names in the jury list. In 1964 the responsible officials had solicited juror recommendations from several blacks, including two judges, the director of the Newark Urban League and others. The special appeal produced approximately 250 names. The names that were gathered by this concerted effort were exhausted prior to the time when the events in question took place,[147] and since there were no significant replenishments, the composition of the list was again deficient when the *Yeager* prosecution began.

Deterioration over the course of the years is not the only weakness to which even a thorough effort to establish a valid key-man system is vulnerable. Even in the case of a single usage of the system under unusually close court supervision the inherent weaknesses of the key-man method can render its results unsatisfactory. For example, at one point in the controversy that ultimately led to *Turner*, blacks who were familiar with the black community were employed to assist the jury commissioners in obtaining a valid jury list. Nevertheless, under pressures of court order and a virtual trial of the system itself, the effort failed to produce a venire which was acceptable.[148]

It is submitted that any procurement system that calls for the exercise of discretion at the initial stage of procurement entails danger of discrimination.[149] Irrespective of the constitutional right of states to continue such procedures, whenever a jury commissioner or his assistants employ their subjective judgment, there is provided a potential opportunity for injustice. This is true no matter what the motives of the official whose work is being challenged.[150] In the face of these dangers courts and juror procurement officials have certain remedial devices at their disposal. On the one hand, they can deliberately attempt to balance jury lists, although certainly not the panels of specific cases,[151] through the purposeful inclusion of members of groups against which discrimi-

145. *Id.*
146. *E.g.*, Cassell v. Texas, 339 U.S. 282, 290 (1950).
147. Smith v. Yeager, 465 F.2d 272, 281 (3d Cir. 1972).
148. 396 U.S. 346, 357-58 (1970).
149. State v. Rochester, 54 N.J. 85, 90, 253 A.2d 474, 476 (1969).
150. Alexander v. Louisiana, 405 U.S. 625, 632 (1972).
151. *See* note 46 and accompanying text *supra.*

nation has been practiced. Such purposeful inclusion has been held nonviolative of the equal protection and due process clauses of the fourteenth amendment.[152] It is submitted, however, that this technique of deliberate balancing is not the most satsifactory remedy available. Even if an acceptable attempt is made at dividing the community into its constituent population elements, there seems to be an inevitable tendency to rely upon the upper strata of the various sub-communities to provide names for the jury list.[153] Furthermore, conscious balancing may produce the adverse effect of prompting jurors who know of the attempts at balancing the identifiable groups to assume that they are on the jury to uphold the supposed prejudices of their group rather than to determine justice without reference to group distinctions. In contrast, random selection is far less fraught with the dangers of discrimination. Since it excludes all selection by the jury commissioners at the initial stage in juror procurement, it eliminates the tendency toward selecting potential jurors from the upper socio-economic levels of the various identifiable groups. Furthermore, since it is the only method which in actuality affords every qualified juror an equal chance of being called for service, it is in full accord with the representative cross section test, which has in recent years assumed an increasing importance in determining the constitutionality of juries alleged to have been summoned in a discriminatory manner.

VI. Conclusion

There is no inherent reason for state use of the key-man jury selection system to continue. The federal judiciary has taken measures to set it aside, and surely the same factors and considerations which led to its removal from the federal system are present in the state systems as well. The mere fact that the federal courts have refused to hold unconstitutional state use of the method provides no basis for continued state reliance upon it. Even though the federal courts do not declare the suggester system practices invalid on their face, there is always the prospect that the result of a particular instance of its employment will be unconstitutional. A practice which is so susceptible to misuse, so increasing-

152. *E.g.*, Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967).

153. For example, black judges and the director of the Newark Urban League are reported as having been consulted in Smith v. Yeager, 465 F.2d 272, 277 (3d Cir. 1972).

ly subject to attack, so detracting from the confidence that should be accorded the judicial system, and which serves no valid ends that cannot be produced by other methods, should be discarded.

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